



Brian Schweitzer  
Governor

# OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

Chief Public Defender  
Randi Hood

STATE NOTARIAL  
TEST NO. 8  
2/2/11  
SB 187

## MEMORANDUM

TO: Senate Judiciary Committee

FROM: Harry Freebourn, Administrative Director

CC: Chairman Fritz Gillespie and Chief Randi Hood

DATE: January 31, 2011

RE: Assessment and Payments of Costs for Assigned Public Defenders

Attached to this memorandum is a document that discusses assessment and payments of costs for assigned public defenders and a worksheet that shows the collections and assessments by fiscal year. We hope this information is useful as you hear SB 187, Generally Revise Public Defender Laws.

## Assessments and Payment of Costs for Assigned Public Defenders

¶1 Included is the accounting report for the collection of the costs of representation assessed by courts on convicted criminal defendants as a part of or a condition under a sentence imposed. Segregating Senate Bill 263 (2009), by fiscal year, the report details the number of people upon whom the courts assessed a payment of costs, the total amounts assessed in a fiscal year, the amounts collected by year, the number of people who paid in full their accounts receivable during a year, the number of people who had accounts receivable open at the end of a year, and the accounts receivable balances owed at the end of a year.

¶2 Before the statewide public defender system went into effect on July 1, 2006, a court could impose the cost of reasonable compensation and costs incurred by the court-appointed counsel in the proceeding as part of or as a condition under the sentence. *M.C.A. §46-8-113(1) and (2) (2005)*. These subsections were amended to provide that the costs assessed would be limited to those incurred by the office of state public defender [OPD] after the statewide system began operations. *Id.* The Montana Public Defender Act of 2005 established a public defender account in the state special revenue fund which can receive deposits from several sources including "payments for the cost of a public defender ordered by the court pursuant to 46-8-113 as part of a sentence in a criminal case." *M.C.A. §47-1-110*. Before the system went into effect, payments were made to the clerks of the district courts who, in turn, forwarded the payments to the department of revenue for deposit into the general fund. *M.C.A. §46-8-114 (2005)*. Since the system went into effect most of the payments come directly from the clients, although some payments are collected by clerks of court and are forwarded to OPD, for deposit into the special revenue account. That money can be used only for the operation of the statewide public defender system. *M.C.A. §47-1-110*.

¶3 OPD does not decide who will be assessed to pay for the cost of representation. Nor does OPD determine how much the person should pay. The courts are tasked to do both. *M.C.A. §46-8-113*.

¶4 Senate Bill 263 (2009) amended *M.C.A. §46-8-113(1)* to require the courts to make a cost assessment of \$150 for misdemeanors and \$500 for felonies as a part of or a condition under a sentence of a convicted defendant who was represented by a public defender. However, there are exceptions to mandatory assessments of \$150 or \$500 on every person convicted or who pleads guilty.

¶5 First, the cost must be limited to the cost incurred by OPD for providing the defendant with counsel. *M.C.A. §46-8-113(2)*. For example, a court of limited jurisdiction assessed less than \$20 on a defendant represented by a public defender. A county attorney who did not prosecute the case concluded that either the public defender was not candid with the court or the assistance could not have been effective when the public defender reported to the court that only about 15 minutes was spent on the

representation. An investigation revealed these facts:

1. The misdemeanor charge alleged the issuing of a bad check;
2. Upon being advised he could be facing up to a \$500 fine and up to 6 months in jail, the defendant wanted to see an attorney he could not afford;
3. The new client appeared for his meeting with the assigned public defender;
4. The client simply wanted to know what he might really be facing;
5. The attorney answered his questions in a matter of minutes;
6. At that meeting the client said he wanted to plead guilty; and
7. Later, the client, standing with the public defender, entered a plea of guilty and was sentenced in short order.
8. The public defender reported the 2 tenths of an hour he spent in the office with the client and the few minutes in court as about 15 minutes.

The attorney could have been held in contempt if more or less time than that spent had been reported. Fraud would have been committed on the defendant if the time spent on the case had been inflated or the public defender had recommended the statutory \$150 be assessed. \$150 for 15 minutes equals \$600 an hour, an exorbitant rate by any measure, and many times in excess of the *M.C.A. §46-8-113(2)* prohibition against assessing costs greater than those incurred by OPD.

¶6 Second, imposition of \$150 in every misdemeanor case and \$500 in every felony case, regardless of the time counsel spent or consideration of the defendant's ability to pay, takes on unconstitutional "elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *State v. Ellis*, 339 Mont. 14, 18, ¶14, quoting from *James v. Strange*, 407 U.S. 128, 142 (1972). Provisions similar to those in *M.C.A. §46-8-113(3)* and (4) are permissible under constitutional principles of equal protection and the availability of legal counsel. *State v. Farrell*, 207 Mont. 483, 492 (1984), citing *Fuller v. Oregon*, 417 U.S. 40 (1974). *Ellis*, 339 Mont. at 18-19, ¶¶16-17, affirms the constitutionality of *M.C.A. §46-8-113(3)* and (4).

¶7 Third, courts can impose payment of the cost of representation only on those who can or will be able to pay and then only in an amount the person can pay. But for substituting "assigned counsel" for "court-appointed counsel," *M.C.A. §46-8-113(3)* is the same as it read before the statewide public defender system existed:

- (3) The court may not sentence a defendant to pay the costs of court-appointed counsel unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and

the nature of the burden that payment of costs will impose.

¶8 A court cannot reserve for itself the right to change the sentence or add conditions at a later time and, absent statutory authority, lacks the jurisdiction to modify the sentence later. *State v. Hirt*, 329 Mont. 267, 271, ¶¶19-20 (2005). Before sentencing a defendant to pay for the cost of representation, the court must conduct a mandatory *M.C.A. §46-8-113(3)* inquiry into the ability of the defendant to pay and, upon consideration of the available evidence, make a determination of the extent to which the defendant is or will be able to pay. *Hirt*, 329 Mont. at 271, ¶20. A full-fledged adversarial inquiry is not required but any defenses to payment asserted by the defendant should be fully considered. *Farrell*, 207 Mont. at 492, quoting from *United States v. Bracewell*, 569 F.2d 1194, 1200 (2<sup>nd</sup> Cir. 1978). An order for the payment of the cost of representation cannot stand without a meaningful inquiry into the defendant's financial status and a finding on the record that there are sufficient resources to repay the cost. *Hirt*, 329 Mont. at 271, ¶22, citing *Farrell*. A sentence is illegal if the court does not make an affirmative finding that the defendant can afford to pay the amount ordered. *State v. Starr*, 339 Mont. 208, 210, ¶10 (2007).

¶9 The courts may order payment of the OPD cost assessed "... to be made within a specified period of time or in specified installments." *M.C.A. §46-8-114*. When a court defers imposition of a sentence or suspends all or a portion of execution of the sentence the judge may impose the payment of the cost of a public defender as a condition during the deferred imposition or suspension of the sentence. *M.C.A. §46-18-201(4)(g)*. In most instances a sentence can be deferred for a period not exceeding 1 year for a misdemeanor or for a period not exceeding 3 years for a felony. *M.C.A. §46-18-201(1)(a)(i)*. However the period of deferment can be doubled if a financial obligation is imposed as a condition of the sentence. *M.C.A. §46-18-201(1)(a)(ii)*.

¶10 Courts can impose other financial obligations on indigent defendants beside paying the cost of representation. *M.C.A. §46-18-201(4)(d), (e), and (f)* allow the sentencing judge to impose conditions for the payment of the costs of confinement, payment of a fine as provided in *§46-18-231*, and payment of costs as provided in *§46-18-232* and *§46-18-233*. *M.C.A. §46-18-232(1)* costs include the costs of jury service, the costs of prosecution, and the costs of pretrial, probation, or community service supervision in misdemeanor or felony cases. These costs must be limited to expenses specifically incurred by the prosecution or other agency in connection with the proceedings against the defendant, or \$100 per felony case or \$50 per misdemeanor case, whichever is greater. Like *M.C.A. §46-8-113* costs, a court may not sentence a defendant to pay a fine or costs unless it is determined the person is or will be able to pay. *M.C.A. §46-18-231(3)* and *§46-18-232(2)*.

¶11 All courts of original jurisdiction must impose upon conviction or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or

finer of (a) \$15 for each misdemeanor charge; (b) the greater of \$20 or 10% of the fine levied for each felony charge; and (c) an additional \$50 for each misdemeanor and felony charge under title 45, §61-8-401, or §61-8-406. *M.C.A. §46-18-236(1)*. The \$15 and \$20 (or 10%) charges collected are earmarked for paying the salaries of deputy county attorneys, other salaries in the office of the county attorney, or the salaries of city and town attorneys and deputies. *M.C.A. §46-18-236(6)*. The court is required to waive payment of the §46-18-236(1) charges if it determines under *M.C.A. §46-18-231(3)* and §46-18-232(2) that the person is not able to pay the fine and costs or make payment within a reasonable time. *M.C.A. §46-18-236(2)*.

¶12 In addition, regardless of whether any part of the sentence is deferred or suspended, the sentence must require payment of full restitution to the victim if the sentencing judge finds that a victim has sustained a pecuniary loss. *M.C.A. §46-18-201(5)*. The costs of supervising the payment of restitution are imposed at a rate of 10% of the restitution ordered, but not less than \$5. *M.C.A. §46-18-241(2)*. If the person ordered to pay restitution is not able to pay any restitution due to circumstances beyond his or her control the court may order the performance of community service for which the person must be given credit. *M.C.A. §46-18-241(3)*.

¶13 Priorities have been set for the allocation of payments of restitution, charges, costs, and fines in *M.C.A. §46-18-251(2)*:

(2) Except as otherwise provided in 46-18-236(7)(b) and this section, if a defendant is subject to payment of restitution and any combination of fines, costs, charges under the provisions of 46-18-236, or other payments, 50% of all money collected from the defendant must be applied to payment of restitution and the balance must be applied to other payments in the following order:

- (a) payment of charges imposed pursuant to 46-18-236;
- (b) payment of supervisory fees imposed pursuant to 46-23-1031;
- (c) payment of costs imposed pursuant to 46-18-232 or 46-18-233;
- (d) payment of fines imposed pursuant to 46-18-231 or 46-18-233;  
and
- (e) any other payments ordered by the court.

*State v. Brown*, 354 Mont. 329, 333, ¶14 (2009), holds that payments earmarked for the cost of representation must be transmitted to OPD for deposit into the special revenue fund and cannot be allocated according to the priorities set in *M.C.A. §46-8-251(2)*.

¶14 A defendant may return to court and ask for remission of any remaining unpaid OPD cost assessed at sentencing. *M.C.A. §46-8-113(4)*, is the same as it was

before 2005:

(4) A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

¶15 *M.C.A. §46-18-232(3)* is an identical provision for a defendant to seek remission for the payment of *§46-18-232(1)* costs. There is not a similar provision for the payment of fines although the court is supposed to determine at sentencing whether the defendant can or will be able to pay a fine, *M.C.A. §46-18-231(3)*; and *M.C.A. §46-18-233(2)* prohibits the revocation of a deferred or suspended sentence upon default if the default is not attributable to an intentional refusal to obey the court's order or a failure to make a good faith effort to make the payment. The payment of restitution may be modified or waived. *M.C.A. §46-18-246*.

¶16 *M.C.A. §46-8-115* provides for penalties that can be imposed by the sentencing court if a person ordered to pay the cost of representation is in default. This statute appears to be modeled after the recoupment statute approved in *Fuller v. Oregon* by the United States Supreme Court. *State v. Lenihan*, 184 Mont. 338, 344-45 (1979). A person in default on the payment of the cost of representation ordered can be brought into court by the prosecutor or the court on a show cause citation or an arrest warrant to show why the default should not be treated as a contempt of court. *M.C.A. §46-8-115(1)*. The court may modify the terms of payment or revoke the payment of any unpaid portion in whole or in part if the court determines the default is not contempt. *M.C.A. §46-8-115(4)*. Conversely, *M.C.A. §46-8-115(2)* permits the court to find the default constitutes civil contempt if the accused fails to show a good faith effort to make the payment or that the default was not attributable to an intentional refusal to obey the court's order to pay the cost. *M.C.A. §46-8-115(3)* sets the imprisonment penalty for a finding of contempt:

(3) The term of imprisonment for contempt for nonpayment of the costs of assigned counsel must be set forth in the judgment and may not exceed 1 day for each \$25 of the payment, 30 days if the order for payment of costs was imposed upon conviction of a misdemeanor, or 1 year in any other case, whichever is the shorter period. A person committed for nonpayment of costs must be given credit toward payment for each day of imprisonment at the rate specified in the judgment.

¶17 Further, *M.C.A. §46-8-115(5)* establishes the procedure for the collection of payments on which there has been a default:

(5) A default in the payment of costs or any installment may be collected by any means authorized by law for the enforcement of a judgment. The writ of execution for the collection of costs may not discharge a defendant committed to imprisonment for contempt until the amount of the payment for costs has actually been collected.

¶18 *Brown*, 354 Mont. at 333, ¶13, mentions that OPD, if required, is not prevented from advising the court or the prosecution about the status of payments. However, a financially eligible person cited to show cause should be entitled to representation by a public defender since there is a potential for incarceration upon a finding the person is in civil contempt for not paying the cost of representation by a public defender in an earlier proceeding. It would be awkward at best, and an impermissible ethical conflict of interest at worst, for a public defender to represent a person in a contempt proceeding initiated by a report from OPD. On the other hand, it is permissible for the district court to order payments for the cost of representation be made to the clerk of court rather than directly to OPD. *Brown*, 354 Mont. at 333, ¶14. Presumably, courts of limited jurisdiction are permitted to order the same. At ¶13, *Brown* notes that probation officers can monitor payments. Ethical concerns are dampened by having the prosecutor or the court initiate a contempt proceeding on information from a source other than OPD. Such a procedure fits with more traditional roles, particularly when there is a likelihood of outstanding balances on other charges, costs, fines or restitution.

¶19 A role of the public defender at a sentencing stage or during a contempt proceeding is to develop any defenses the defendant may have to payment of restitution, fines, and the assessment of costs, including the cost of representation, and present those defenses at the hearing. Those issues are thereby preserved for appeal if there is something illegal about an order for payment.

¶20 The failure of a public defender in fulfilling this role raises the issue of ineffective assistance of counsel because there would be no record on which a reviewing court could determine there was a meritorious defense. Further, an appellate court generally will not review sentencing issues on appeal that were not raised in the lower court by an objection. *State v. Kotwicki*, 335 Mont. 344, 347, ¶8 (2007). *Lenihan*, 184 Mont. at 343, provides an exception to the general rule but only allows appellate review of a sentence that is alleged to be illegal or in excess of statutory mandates. *Kotwicki*, 335 Mont. at 347, ¶8. A sparingly used common law plain error review might be available but that review is discretionarily determined on the basis of the particular facts and circumstances of each case compelling a finding that (a) not reviewing the claimed error may result in a manifest miscarriage of justice, (b) may leave unsettled the question of the fundamental fairness of the trial or proceedings, or (c) may compromise the integrity of the judicial process. *State v. Upshaw*, 335 Mont. 162, 165, ¶12 (2006).

¶21 Absent an appellate review, the defendant could return to the sentencing court for a change in the amount of the payments ordered on the basis of manifest hardship. *M.C.A. §46-8-113(4); §46-18-232(2); §46-18-246*. Even later the defendant could argue a good faith effort to pay the cost of representation was made or that the default was not attributable to an intentional refusal to obey the court's order at a *M.C.A. §46-8-115* civil contempt hearing. Obviously, it is important for public defenders to advocate the defenses against sentences ordering the payment of the cost of representation so lawful assessments are entered and burdensome, unnecessary, costly, time consuming appeals and post-sentence hearings are reduced, if not avoided.

¶22 Within the foregoing framework of statutes and case law the sentencing judges of the 56 district courts in 22 judicial districts and the 152 courts of limited jurisdiction have determined at sentencing pursuant to *M.C.A. §46-8-113(3)* that the vast majority of the people represented by public defenders cannot or will not be able to pay the cost of representation. Since the inception of the statewide system more than 100,000 clients have been represented by the end of fiscal year 2010 and the courts have imposed the payment of some amount of the cost on 1604 defendants in criminal cases. The report accounting for the payment of costs demonstrates that amounts assessed have grown from \$34,515 on 67 clients for fiscal year 2007, to \$114,566 on 265 clients in 2008, to \$205,571 on 448 clients in 2009, to \$263,377 on 824 clients in 2010. Defendants have paid a total of \$136,090 over four fiscal years, of which \$60,674 was paid in fiscal year 2010.

¶23 There are impediments to recouping more costs. The *Brown* Court applied the rule of statutory construction in ¶12 that a particular statutory provision is paramount to a general provision so a particular intent will control over a general one that is inconsistent. However, the decision does not specifically hold that any payments are applied first to the cost of representation before allocating any balance among the items listed in *M.C.A. §46-18-251(2)*. *Brown* also left unclear who determines whether a payment is for the cost of representation or is a payment for distribution among the *M.C.A. §46-8-251(2)* items if the sentencing order does not. Although not necessarily universal, the trend seems to be that people are instructed to pay the *M.C.A. §46-8-251(2)* items assessed before any payments are sent to OPD for reimbursement of the cost of representation. Legislation setting a higher priority for allocating payments for the cost of representation will be necessary before there can be a pragmatic expectation of a greater recovery of those costs.

¶24 While greater assessments are being ordered on more defendants and more of them are paying more each year, more people (1,433) owed more (\$481,939) at the end of 2010 than at any other time. This trend is consistent with the situation in other public defender programs. This year the Brennan Center for Justice at the New York University School of Law published a study entitled "Criminal Justice Debt: A Barrier to Reentry" that can be accessed at [http://brennan.3cdn.net/c610802495d901dac3\\_76m6vqfhpv.pdf](http://brennan.3cdn.net/c610802495d901dac3_76m6vqfhpv.pdf).



Charges used by fifteen states other than Montana were studied and conclusions were drawn about the consequences of imposing those charges on the indigent as well as the negative impact the efforts at collecting those charges have on the justice system as a whole including the courts, court staff, law enforcement, prisons and jails. Plenty can be found in the report to distinguish the situation in Montana from the findings in the report. However, careful study and consideration must be given to whether the same negative consequences the report found will emerge in Montana before more emphasis is put on charging indigent defendants for the cost of their representation and collection efforts are ramped up.

Office of the State Public Defender  
Judgments, Assessments and  
Collections of Legal Fees  
FYE 10

	FY 2007	FY 2008	FY 2009	FY 2010
<b>JUDGMENTS PRE SB 263 AND OPD ASSESSMENTS</b>				
Balance of A/R @ Beg of Year	\$ -	\$ 26,497	\$ 106,244	\$ 279,236
Assessments by Year	34,515	114,566	205,571	35,306
Total Collections by Year	(8,018)	(34,818)	(32,580)	(26,501)
# of Clients represented by Collections Total	20	81	230	212
Total Balance of A/R @ End of Year **	\$ 26,497	\$ 106,244	\$ 279,236	\$ 288,041
Total # of Clients with open A/R @ Beg of Year	-	61	291	679
# of Clients Assessments by Year	67	265	448	13
Total # of Clients paid in full during fiscal year	(6)	(35)	(60)	(30)
Total # of Clients with open A/R @ End of Year	61	291	679	662
<b>SENATE BILL 263</b>				
Balance of A/R @ Beg of Year	\$ -	\$ -	\$ -	\$ -
Assessments by Year	-	-	-	228,071
Total Collections by Year	-	-	-	(34,174)
# of Clients represented by Collections Total	-	-	-	254
Total Balance of A/R @ End of Year **	\$ -	\$ -	\$ -	\$ 193,898
Total # of Clients with open A/R @ Beg of Year	-	-	-	-
# of Clients Assessments by Year	-	-	-	811
Total # of Clients paid in full during fiscal year	-	-	-	(40)
Total # of Clients with open A/R @ End of Year	-	-	-	771
<b>TOTAL ALL JUDGMENTS AND ASSESSMENTS INCLUDING SENATE BILL 263</b>				
Balance of A/R @ Beg of Year	\$ -	\$ 26,497	\$ 106,244	\$ 279,236
Assessments by Year	34,515	114,566	205,571	263,377
Total Collections by Year **	(8,018)	(34,818)	(32,580)	(60,674)
# of Clients represented by Collections Total	20	81	230	466
Total Balance of A/R for Reporting Year **	\$ 26,497	\$ 106,244	\$ 279,236	\$ 481,939
Total # of Clients with open A/R @ Beg of Year	-	61	291	679
# of Clients Assessments by Year	67	265	448	824
Total # of Clients paid in full during fiscal year	(6)	(35)	(60)	(70)
Total # of Clients with open A/R @ End of Year	61	291	679	1,433

\*\* Financial Statement Reporting as follows      \$ -      \$ 66,637      \$ 213,181      \$ 481,939  
There exists a variance between A/R Reported here, and A/R reported on Financial Statements. This is created out of a time lag between dated court orders and signature of those orders, and a secondary lag for that information to make its way to the OPD Central Office for reporting here.